U.S. Corrections Corporation d/b/a Lee Adjustment Center *and* Kentucky Corrections Officers Association, Petitioner. Case 9–RC–16773

February 11, 1998

DECISION ON REVIEW AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HURTGEN

On April 8, 1997, the Regional Director for Region 9 issued a Decision and Order Revoking Certification in this proceeding, in which he ordered the revocation of the National Labor Relations Board's certification of the Kentucky Corrections Officers Association, the Petitioner herein, as the exclusive collective-bargaining representative of the correctional officers employed at the Lee Adjustment Center, the Employer.[1] Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Petitioner filed a timely request for review of the Regional Director's decision, and the Employer filed a response.[2] By Order dated July 9, 1997, the Board granted the Petitioner's request for review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The issue is whether the Board's certification of the Petitioner as the collective-bargaining representative of the Employer's guard employees should be revoked because of an asserted indirect affiliation with a union representing nonguard employees, in contravention of Section 9(b)(3) of the Act. The Regional Director resolved this question in the affirmative. We have carefully considered the entire record in this case, and have decided to reverse the Regional Director's determination. As explained below, we conclude that the evidence is insufficient to establish a current affiliation between the Petitioner and Local 557 of the Service Employees International Union (Local 557), a union representing nonguard employees, and therefore revocation of the Petitioner's certification is not warranted.

I. FACTS

The facts of this case are more fully detailed in the Regional Director's decision. In brief, the Employer operates a minimum security correctional facility near Beattyville, Kentucky, pursuant to a contract with the Commonwealth of Kentucky.[3] There are approximately 55 correctional officers in the bargaining unit certified by the Board, and it is undisputed that these employees are guards within the meaning of Section 9(b)(3).

In the spring of 1996, in an earlier, separate Board proceeding, Paul Hounshell, a business agent for Local 557, filed a petition to represent the Employer's correctional officers. The Regional Director administratively dismissed the petition as invalid under Section 9(b)(3), because the employees sought were guards within the meaning of Section 9(b)(3) and Local 557 admitted to membership employees other than guards. The Board thereafter denied review of the Regional Director's dismissal of the petition. Subsequently, the correctional officers organized themselves, formed the Petitioner, and filed a representation petition in the instant proceeding. In the fall of 1996, the Regional Director issued a Decision and Direction of Election. He found, inter alia, that Hounshell of Local 557 had provided assistance to the Petitioner in its self-organizational efforts and had appeared at the preelection hearing on the Petitioner's behalf. The Regional Director concluded, however, that Hounshell's limited assistance in the Petitioner's formative stages was insufficient to find an indirect affiliation between the Petitioner and Local 557 which would disqualify the Petitioner under Section 9(b)(3). The Board thereafter denied review of the Regional Director's findings.

The Petitioner subsequently won the representation election, which was conducted on October 11, and November 8, 1996, the Regional Director certified the Petitioner as the bargaining representative of the unit employees. Thereafter, the Petitioner requested that the Employer negotiate a collective-bargaining agreement. On February 10, 1997,[4] the Employer filed with the Regional Director a petition to revoke the Petitioner's certification, and on March 26 a hearing was conducted on the Employer's petition.

The facts are not in dispute. The parties' first negotiating meeting was on January 7. The Petitioner's specific bargaining proposals presented at the meeting had been formulated by Hounshell pursuant to the advice of the unit employees. In addition, Hounshell was present and an active participant in the negotiations on the Petitioner's behalf. The parties met again on February 4. The Petitioner presented a tentative collective-bargaining agreement, which had been drafted by Hounshell based on the proposals from the first meeting. Again, Hounshell played an active role in the discussions on behalf of the Petitioner.

On February 10, the Employer filed with the Regional Director a petition to revoke the Petitioner's certification in view of Hounshell's conduct. By letter dated February 17, Hounshell informed Thomas Horn, a unit member and the Petitioner's business manager, that neither he nor any other representative of Local

[1] The Regional Director's decision is attached as an appendix.

[2] The Employer's contention that the Petitioner's request for review was untimely filed is without merit. It was in fact timely postmarked and received by the Board in Washington, D.C. See Sec. 102.111(b) of the Board's Rules and Regulations.

[3] The Board's jurisdiction in this representation proceeding is not in issue.

[4] All subsequent dates are in 1997 unless otherwise noted.

557 would further assist in any capacity with the negotiations between the Petitioner and the Employer. Horn forwarded a copy of the letter to the Employer. In late February, the Employer mailed to Hounshell a copy of the bargaining proposals it had prepared for the next negotiating session. Hounshell mailed the proposals back to the Employer. On March 4, the parties met again. Hounshell did not attend the meeting.

At the March 26 hearing on the Employer's petition to revoke, John Ratliff, a unit member and the Petitioner's financial secretary/treasurer, testified, inter alia, that the Petitioner's officials lacked expertise in collective bargaining. He stated further that the Petitioner did not make any payments to Hounshell in return for his assistance. He also testified that there was no money in the Petitioner's account at that time because the Petitioner had not yet begun collecting dues from the membership. In addition, Ratliff testified, without contradiction, that Hounshell had provided no assistance or service of any kind to the Petitioner since his February 17 letter.

On April 8, the Regional Director issued a decision revoking the Petitioner's certification. In his decision the Regional Director focused primarily on the duration of Hounshell's assistance to the Petitioner: a period of 8 months, from the Petitioner's inception through the election and certification and at least through the February 4 bargaining session. Despite Hounshell's February 17 letter stating that Local 557's assistance had terminated, the Regional Director found that the evidence did not show sufficiently that he had actually ceased all activities on the Petitioner's behalf. He also noted that the Petitioner lacked funding and collective-bargaining experience, indicating a dependence on the expertise Hounshell provided. The Regional Director found that, given the nature and duration of the assistance provided by Hounshell, and thus by Local 557, the Petitioner did not possess the freedom and independence to formulate its own policies. He concluded that the Petitioner is indirectly affiliated with Local 557 in contravention of Section 9(b)(3), and accordingly that revocation of the Petitioner's certification was required.

II. DISCUSSION

Section 9(b)(3) states, in relevant part, that ''no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization . . . is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.'' Indirect affiliation between a guard union and a nonguard union is established when ''the extent and duration of [the guard union's] dependence upon [the nonguard union] indicates a lack of freedom and independence in formulating its own policies and deciding its own course of action.'' *Wells Fargo Guard Services*, 236 NLRB 1196, 1197 (1978), quoting *Magnavox Co.*, 97 NLRB 1111, 1113 (1952). However, the noncertifiability of a guard union must be shown by definitive evidence. Any less stringent standard would seriously undermine the rights of guards to be represented by a union and of guard unions to represent guards. See, e.g., *Children's Hospital of Michigan*, 317 NLRB 580, 581 (1995), enfd. sub nom. *Henry Ford Health System v. NLRB*, 105 F.3d 1139 (6th Cir. 1997). Finally, and most important for our evaluation of the question whether to revoke the Petitioner's certification, the Board historically has ''refused to find indirect affiliation where, on the record, it appeared that the assistance and advice once received by the guard union from the nonguard union had, in fact, terminated.'' *International Harvester Co.*, 145 NLRB 1747, 1749 (1964) (footnote citations omitted).

We agree with the Regional Director that Local 557's assistance, provided to the Petitioner until mid-February, exceeded the restriction imposed by Section 9(b)(3).[5] If the record established that this indirect affiliation of the two unions represented the status quo, at least as of the time of the March 26 hearing, we would affirm the Regional Director's revocation of the Petitioner's certification. See, e.g., *International Harvester*, supra; *Mack*, supra; *Magnavox*, supra.

However, the record affirmatively establishes that by mid-February the Petitioner had severed its indirect affiliation with Local 557. In this regard, Hounshell informed the Petitioner in his February 17 letter that all assistance by Local 557 to the Petitioner in its negotiations with the Employer had ceased. Soon thereafter, when the Employer sent Hounshell a copy of its collective-bargaining proposals, Hounshell sent them back. Subsequently, he did not attend the March 4 negotiating session, the latest bargaining meeting on this record. Finally, the Petitioner's financial secretary/-treasurer testified, without contradiction, that Hounshell had not provided any assistance or services to the Petitioner following his February 17 letter. The Employer offered no evidence to rebut this showing that Hounshell's assistance to the Petitioner had ceased no later than February 17. Since that date, the Petitioner has participated in at least one bargaining session with the Employer without Hounshell's assistance, thereby demonstrating an ability to function independently of Local 557 in representing unit employees. Thus, on this record, it is apparent that Local 557's af-

[5] The Board has interpreted the legislative intent of Sec. 9(b)(3) to mean that guard unions and nonguard unions should be ''completely divorced'' from each other. See, e.g., *Armored Transport Inc.*, 269 NLRB 683 (1984), quoting *Mack Mfg. Corp.*, 107 NLRB 209, 212 (1953).

filiation with the Petitioner has terminated.[6] Accordingly, neither the evidence nor precedent supports a revocation of the Petitioner's certification.[7] See *International Security Corp.*, 223 NLRB 1129 (1976); *Inspiration Consolidated Copper Co.*, 142 NLRB 53 (1963); and *Ingersoll-Rand Co.*, 119 NLRB 601 (1957); and *Federal Services*, 115 NLRB 1729 (1956).[8]

ORDER

The Regional Director's order revoking the certification of the Kentucky Corrections Officers Association in Case 9–RC–16773 is vacated.

[6] Because we are satisfied that Local 557's assistance has terminated, we find the Petitioner's lack of funds insignificant; we note particularly that it has not yet collected dues from its membership.

[7] We emphasize, however, that our finding is based on the present record evidence. We would, of course, consider any subsequent evidence of improper assistance by Local 557 to the Petitioner in a subsequent proceeding.

[8] The Board's decision in *Stewart-Warner Corp.*, 273 NLRB 1736 (1985), on which the Regional Director primarily relied, is distinguishable. In that case, unlike here, there was no evidence the nonguard union's assistance had ceased.

APPENDIX

DECISION AND ORDER REVOKING CERTIFICATION

At the preelection hearing in the subject case held on August 28, 1996, the Employer took the position that the Petitioner was either directly or indirectly affiliated with Service Employees International Union, Local 557, AFL–CIO (the SEIU) and inasmuch as the SEIU admittedly represents nonguards, the Petitioner could not be certified to represent the Employer's correctional officers who are ''guards within the meaning of Section 9(b)(3) of the Act.'' On September 13, 1996, I issued a Decision and Direction of Election in this matter in which I disagreed with the Employer's position and directed an election among all full-time and regular part-time correctional officers employed by the Employer at its Lee Adjustment facility. Thereafter, the Employer filed with the Board a request for review of the decision which was denied on October 10, 1996.

Pursuant to the Decision and Direction of Election, an election among the employees in the unit found appropriate was conducted on October 11, 1996. The tally of ballots disclosed that there were approximately 55 eligible voters, of whom 36 cast ballots in favor of the Petitioner and 19 voted against union representation. On October 18, 1996, the Employer filed timely objections to conduct affecting the results of the election. On November 8, 1996, I issued a supplemental decision overruling the Employer's objections and certifying the Petitioner as the exclusive collective-bargaining representative of the employees in the appropriate unit within the meaning of Section 9(a) of the Act.

On February 10, 1997, the Employer filed a ''Petition to Reopen Record,'' which l considered as a petition to revoke the Petitioner's certification, in which it maintains that the SEIU is continuing to engage in conduct which establishes a direct or indirect affiliation between the Petitioner and the SEIU. The Employer's petition was supported by an affidavit from its director of human resources, Beverly Heiney, who is also on the Employer's negotiating committee. As a result of the issues raised by the Employer's petition, I ordered that a further hearing be conducted with respect to such issues.

Pursuant to my order, a further hearing was conducted by a hearing officer of the National Labor Relations Board on March 26, 1997. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[1]

The record discloses that on April 4, 1996, the SEIU, represented by Business Manager Paul Hounshell, filed a petition in Case 9–RC–16716 seeking to represent all correctional officers employed by the Employer at its Lee Adjustment facility. The petition in that case was administratively dismissed on April 18. 1996, as the evidence disclosed, and the parties agreed, that the unit sought included individuals who were guards within the meaning of Section 9(b)(3) of the Act, and that the SEIU admitted to membership employees other than guards. Thereafter, the Employer's employees formed the Petitioner, which filed the instant petition seeking to represent the correctional officers. The petition was signed by Thomas C. Horn II, who was instrumental in forming the Petitioner and is currently serving as its business manager. The Petitioner obtained membership cards, filed the petition and held a number of informal meetings. In the Decision and Direction of Election, I noted that Horn sought advice on several occasions from Hounshell and that Hounshell instructed Horn concerning the wording on the petition. In addition, Hounshell appeared at the preelection hearing on behalf of the Petitioner.

Although recognizing that Hounshell assisted the Petitioner in its formation and organizational efforts, I found in the Decision and Direction of Election that Hounshell's conduct was not sufficient at that time to establish that the Petitioner was either directly or indirectly affiliated with the SEIU. In reaching this decision, I noted that there was no evidence that Hounshell or any other representative of the SEIU helped the Petitioner obtain authorization cards or that the SEIU rendered any financial support to the Petitioner. Moreover, the Petitioner had expressed an intent, if certified, to conduct its own internal business. Under these circumstances, I found that, with the Petitioner in its formative stages, ''the limited assistance rendered by Hounshell thus far [did] not disqualify the Petitioner as the potential representative of the Employer's guards.''

Following the Petitioner's certification, the record discloses that Horn, by letter dated November 21, 1996, to the Employer's warden, Harvey Fields, requested that the parties enter into negotiations for a collective-bargaining contract. On November 27, 1996, the Employer's attorney informed Horn that the Employer was ready to commence negotiations and suggested that Horn contact Fields to make bargaining arrangements. Thereafter, Horn telephoned Fields to schedule a date and place to commence negotiations. During this con-

[1] Although given an opportunity to do so, the Petitioner elected not to file a brief in this matter. The Employer did file a brief which I have carefully considered in reaching my findings in this proceeding.

versation, Horn informed Fields that Hounshell would be participating in negotiations on behalf of the Petitioner.

The first negotiation session was scheduled for January 7, 1997, at the Kentucky Natural Bridge State Park. In preparation for this meeting, the Petitioner solicited from its membership their various complaints and what they wanted the Petitioner to seek during negotiations. Prior to the first meeting on January 7, 1997, the officials of the Petitioner met with Hounshell to discuss these matters and to prepare for negotiations. Based on the input received from the membership, Hounshell formulated specific bargaining proposals.

At the first meeting on January 7, 1997, Attorney Joseph Worthington; Vice Presidents David Donohue, Rauol Cunningham, and Jan Fuson; Director of Human Resources Beverly Heiney; Business Manager Janet Bumett; and Warden Harvey Fields were present on behalf of the Employer. The Petitioner was represented by Horn, Hounshell, and employees John Ratliff, Carl Fox, and Bill Hacker. Before any discussions took place, Worthington inquired as to whether Hounshell was still employed by the SEIU. Hounshell stated that he was still employed by that organization as business manager. Worthington made it clear that the Employer was objecting to Hounshell's participation in negotiations on behalf of the Petitioner and that the Employer would challenge his involvement, if necessary, through Board proceedings. Hounshell stated that he had cleared the matter through the legal department of the SEIU and continued his participation in the meeting. When pressed further by the Employer concerning his participation in negotiations, Hounshell stated that he was merely serving as an advisor to the Petitioner on a fee for service basis. However, the record discloses that the Petitioner does not have any funds. Moreover, the Petitioner concedes that there was no contractual arrangement concerning Hounshell's fee and that he has not been paid anything for his services.

At the January 7, 1997 meeting, the Petitioner presented the Employer with its bargaining proposals. The records discloses that Hounshell and Horn went over a number of the proposals with the Employer. The Petitioner maintains that Hounshell was to handle the technical and language portion of the proposals and that Horn was to deal with the economic issues. In this connection, the Petitioner claims that Horn was the spokesperson for the Petitioner and that Hounshell was merely an advisor with respect to contractual matters that other officials of the Petitioner could not or did not have the expertise to handle. Although there is some dispute as to how much authority Hounshell had in representing the Petitioner, the record discloses that during this meeting the Employer suggested that contract language and noneconomic matters be handled before discussing economic issues. Hounshell then rejected such an approach out of hand, apparently without any discussions with other officials of the Petitioner. Hounshell also stated that if the Employer was not willing to talk about economics, it would be guilty of an unfair labor practice.

At the end of the meeting on January 7, 1997, the parties discussed the time and place for the next meeting. The second meeting was scheduled for February 4, 1997, at the Lee County Firehouse in Beattyville, Kentucky. The date for the second meeting was scheduled so as not to conflict with any future commitments by any of the participants, and the agreed-upon date was specifically approved by Hounshell.

The February 4, 1997 meeting was held as scheduled. The same participants, including Hounshell, who attended the January 7, 1997 meeting were present for the negotiation session on February 4, 1997. At the commencement of the meeting, the Petitioner gave to the Employer's representatives a more formalized contract proposal. Although there is some dispute as to whether Hounshell or another representative of the Petitioner actually distributed the contract proposal the record shows that Hounshell had prepared the proposed contract, apparently based on the individual proposals made by the Petitioner at the meeting on January 7, 1997. After the contract proposal was distributed, Hounshell and Horn went over various items in the proposed agreement. Thereafter, the parties entered into some discussions relating to retirement and health and welfare benefits. The Employer specifically questioned the proposed 12-1/2 percent payment for health and welfare benefits. Hounshell stated that he arrived at this figure based on his prior experience in representing other labor organizations. Hounshell also proposed a 401(k) pension plan, noting that the Federal Government had liberalized regulations making such plans more attractive. Hounshell also answered a question raised by the Employer concerning health and safety, stating that the parties could rely on OSHA to resolve air quality and other problems. In addition, Hounshell proposed that the parties utilize a mediator to assist in upcoming bargaining, which was apparently rejected by the Employer. Finally, Hounshell again rejected the Employer's suggestion that contractual and noneconomic matters be resolved before engaging in economic discussions, stating that if the Employer insisted on this procedure, it would be in violation of the Act.

At the end of the February 4, 1997 meeting, the parties discussed a date for a third negotiation session. Hounshell stated that he had a very busy schedule and that he had three calendars, one for his community business, one for the local (SEIU), and one for the International (SEIU). It is not clear from the record whether the parties agreed on a date and place for a third negotiating session at that time. As the parties were leaving the February 4, 1997 meeting, Hounshell informed the Employer's representatives that the Petitioner expected a complete proposal from the Employer at the next meeting.

The next meeting was subsequently scheduled for March 4, 1997. In the interim, on February 10, 1997, the Employer filed the instant petition to revoke the Petitioner's certification. On February 17, 1997, Hounshell forwarded a letter to Horn stating that neither he nor any other representatives of the SEIU would participate in any manner in regard to future negotiations between the Employer and the Petitioner. Hounshell did not attend the third negotiation session held on March 4, 1997. However, Hounshell did not testify in this proceeding, and there is no evidence as to whether he is continuing to advise or assist the Petitioner behind the scenes.

The parties stipulated that the unit employees are guards within the meaning of Section 9(b)(3) of the Act, and the record discloses that Hounshell is employed as a business manager by the SEIU, a labor organization that represents employees other than guards. Although Hounshell assisted in the formation of the Petitioner, helped it file the initial petition, and represented it at the preelection hearing, I found in the Decision and Direction of Election, which issued on September 26, 1996, that his assistance on behalf of the Peti-

tioner in its formative stages did not, at that time, disqualify it as a potential representative of the Employer's guards. However, Hounshell did not, following the election, cease his activity on behalf of the Petitioner and, while still employed in an official capacity with the SEIU, served as an active representative of the Petitioner at the first and second negotiation sessions held on January 7 and February 4, 1997. Thus, the record shows that Hounshell has been actively involved in the Petitioner from its formation in July 1996 through the first two bargaining sessions with the Employer on January 7 and February 4, 1997, a period of approximately 8 months. Although Hounshell advised the Petitioner on February 17, 1997, that he would no longer assist it in negotiations, there is no evidence that he has ceased his behind-the-scene assistance to the Petitioner. In this connection, the Petitioner admittedly does not have anyone within its organization with the capability or the expertise to handle all aspects of collective bargaining.

Section 9(b)(3) of the Act precludes the certification of a union as the representative of a unit of guards if it ''admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.'' *Stewart-Warner Corp.*, 273 NLRB 1736, 1737 (1985). Moreover, in the event a labor organization certified to represent a unit consisting of guards subsequently becomes directly or indirectly affiliated with a nonguard union, the certification of the labor organization for the guard unit will be revoked. *International Harvester Co.*, 145 NLRB 1747 (1964). As noted by the Employer in its brief, the Board will review the issue of whether a disqualified labor organization is improperly participating in or influencing a guard union at any time. *Brink's Inc. of Florida*, 283 NLRB 711 (1987).

In the instant case, the evidence establishes that the Petitioner, through its dependence on SEIU Business Manager Hounshell, is indirectly affiliated with the SEIU. *Brinks Inc*., 274 NLRB 970 (1985); *Stewart-Warner Corp.*, supra. Although the Board has found that assistance provided by a nonguard labor organization during a guard union's infancy does not, as found in the Decision and Direction of Election, necessarily establish indirect affiliation, the SEIU in this case, through Business Manager Hounshell, has continued its assistance to the Petitioner for approximately 8 months, including participation in negotiations following the Petitioner's certification. Compare *Wells Fargo Guard Services*, 236 NLRB 1196 (1978), with *Brinks Inc.*, supra, and *Stewart-Warner Corp.*, supra.

Based on the foregoing and the entire record, I find that the Petitioner's dependency on the SEIU, a labor organization which is disqualified from representing guards, through its business manager, indicates a lack of freedom and independence on the part of the Petitioner in formulating its own policies and deciding its own course of action. *Mack Mfg. Corp.*, 107 NLRB 209, 212 (1953); *Stewart-Warner Corp.*, supra; and *Brinks, Inc.*, supra. In reaching my decision, I note that Hounshell was involved in every aspect of the establishment of the Petitioner, represented it at the representation hearing and, after the Petitioner was certified, continued to assist the Petitioner in the formulation and drafting of contract proposals and serving as one of its active representatives during the first two negotiatin sessions. At the negotiating sessions, Hounshell presented proposals on behalf of the Petitioner and even rejected proposals made by the Employer, apparently on his own initiative without any discussions with other officials of the Petitioner. I therefore conclude that Hounshell, in his official capacity as a business manager for the SEIU, dominated the Petitioner not only during its initial formation but also in negotiations after it was certified as the bargaining agent of the Employer's guards. *Mack Mfg. Corp.*, supra; and *Stewart-Warner Corp.*, supra. I also find noteworthy the fact that the Petitioner concedes that it has no assets and lacks the capability or expertise to engage in certain aspects of collective bargaining. The Board, in dismissing the petition in *Stewart-Warner Corp.*, supra, emphasized the fact that the guard union in that case had no assets or expertise suggesting its ability to function independently of the disqualified labor organization. Here, the Petitioner, like the guard union in *Stewart-Warner*, has been dependent on the SEIU, as illustrated by the conduct of Business Manager Hounshell, from its inception through two sessions of bargaining covering a period of approximately 8 months. Under these circumstances, it is apparent that the Petitioner does not possess the freedom and independence to formulate its own policies and is indirectly affiliated with the SEIU. *Magnavox Co.*, 97 NLRB 1111 (1952); *Brinks, Inc.*, supra; *Stewart-Warner Corp.*, and supra. Accordingly, I shall revoke the certification issued to the Petitioner. *International Harvester Co.*; supra.

ORDER

IT IS HEREBY ORDERED that the certification of the Petitioner as the exclusive collective-bargaining representative of the Employer's full-time and regular part-time correctional officers which issued in this case on November 8, 1996, be, and it hereby is, revoked.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Order Revoking Certification may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. The request must be received by April 22, 1997.